IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977

No. 77-393

THOMAS R. FADELL, PETITIONER

-vs-

MINNEAPOLIS STAR AND TRIBUNE COMPANY, INC., GEORGE CRILE, ANNE CRILE, JOHN COWLES, JR., RUSSELL BARNARD AND ROBERT SHNAYERSON, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SEPTEMBER TERM 1977

No. _____

THOMAS R. FADELL, PETITIONER

-vs-

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Cappeals for the Seventh Circuit herein, entered in the above entitled case on June 16, 1977.

OPINION BELOW

The opinion of the Seventh Circuit is reported in 557 F.2d 107 (7th Cir. 1977). It is set out below, excluding the caption, in its entirety:

SPRECHER, Circuit Judge. We are required to review the application of the New York Times rule to an alleged defamatory publication relating to a public official.

This is an appeal from the entry of a summary judgment in favor of all of the defendants in a libel action brought by an elected public official, the tax assessor of Calumet Township, Lake County, Indiana, based upon a nine-page article published in the November, 1972 issue of Harper's Magazine entitled "A Tax Assessor Has Many Friends -- The Story of Tom Fadell, his rise to power in Gary, Indiana, and why he will probably stay there."

There was no dispute that the plaintiff was a public official subject to the application of the New York Times rule that the First and Fourteenth Amendments prohibit a public official from recovering damages in a civil libel action for defamatory falsehoods relating to his official conduct unless he proves that the statements were made with actual malice--that is, with knowledge that they were false or with reckless disregard of whether they were false or not. New York Times Co. v. Sullivan 376 U.S 254, 279-280 (1964). New York Times requires that actual malice be shown with "convincing clarity." Id. at 285-286.

Where the New York Times rule is applicable, the Supreme Court has required that an appellate court make an independent examination of the whole record to determine whether it could constitutionally support a judgment for the plaintiff "so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." Id. at 284-285.

In Carson v. Allied News Co., 529 F.2d 206, 210 (7th Cir. 1976), we accepted the following test enunciated in the concurring opinion of Judge Wright in Wasserman v. Time, Inc. 424 F.2d 920, 922-923 (D.C. Cir 1970), for applying the "convincing clarity" standard in summary judgment situations:

> Unless the court finds on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the Times sense, it should grant summary judgment for the defendant.

In Grzelak v. Calumet Publishing Co., 543 F.2d 579,(7th Cir. 1975), we added that the "question for this Court to determine on appeal is whether the pleadings and affidavits show that the material facts about which there can be no genuine issue entitle defendant to judgment as a matter of law."

Inasmuch as the pretrial record in this case is unusually voluminous, the court below was faced with a gigantic task in measuring the plaintiff's contentions of the existence of genuine issues against the pretrial affidavits, depositions and other documentary evidence. This task was fulfilled by that court with painstaking detail and scrupulous documentation in weighing each contention of the plaintiff against the whole record. The lower court's diligence, as well as that of all counsel both when in the lower court and in presenting this appeal, have enabled us to

be guided through the vast record in order to fulfill our appellate function.

The plaintiff had received an advance galley proof of Harper's Magazine article from an unknown source on October 14, 1972 and two days later he notified the magazine's officials of his intention to sue for libel. On October 27, the plaintiff sent a "Notice of Libelous Publication" to Harper's Magazine, complaining of 24 allegedly libelous passages in the article. The 24 passages were incorporated in the complaint filed in the lower court on December 13, 1972. On October 11, 1974, the plaintiff filed an amended complaint again incorporating the 24 passages but adding that "the defendants inferred in said article that plaintiff was a member of the 'Mafia' or had dealings and/or connection with the 'Mafia'...". The lower court found that "(t)hese passages plus additional statements complained of at Fadell's deposition comprise the bases for this lawsuit."

The defendants all joined in two motions for summary judgment, each supported by a memorandum, the lengthier one being 116 pages long and referring to the pretrial documentation relating to the 24 original charges and to 21 additional statements referred to in the plaintiff's deposition. Supporting the defendants motions for summary judgment were seven volumes of material containing documentary sources for each disputed statement. Volumes I through III consist of 33 sets of the author Crile's handwritten interview notes covering 1128 pages. Volume IV consists

of 17 transcripts covering 418 pages of tape recorded interviews. Volume V contains 285 pages of copies of Internal Revenue documents which were given to Crile. Volume VI contains 261 pages and Volume VII 80 pages of miscellaneous documents obtained by Crile or reviewed by him during the course of preparing the disputed article. Source material was provided for all 69 persons interviewed by Crile, either in the seven volumes filed with the summary judgment motions or in the depositions of 23 witnesses covering 5,671 pages. Crile was questioned for eight days and the transcript of his deposition covers 1,443 pages. He also responded to 341 interrogatories.

The plaintiff responded to the defendants' motion for summary judgment with a 214-page memorandum in opposition to summary judgment, supported by three volumes containing 133 attachments, including about 50 affidavits and relying upon 22 alleged false and defamatory statements in the article. The defendants filed a brief response to the opposition.

The lower court carefully analyzed all of the pretrial material and entered four separate orders on December 1, 1976. The first was the summary judgment order in favor of the defendants and against the plaintiff, which is the order appealed from here. The second document was a memorandum opinion which was published in 424 F. Supp. 1075-1088 (N.D. Ind. 1976), and covers 14 pages in the Federal Supplement. All parties had submitted proposed findings of fact and conclusions of law to the district court, which adopted the two

of those submitted by the defendants. The findings and conclusions submitted by the publisher defendants and signed by the court on December 1, 1976 consisted of 25 findings and 2 conclusions. The findings and conclusions submitted by the author defendant and signed by the court consisted of 49 findings and 10 conclusions. All of the plaintiff's contentions are considered and resolved, including the "Mafia" matter (Finding No. 47).

With the guidance of these documents and the briefs on appeal we have examined the whole record and affirm the lower court. We also adopt as our own the lower court opinion at 425 F. Supp. 1075, including the conclusion that "a careful review . . . (of the record) reflects no actual malice whatsoever as that term is contemplated in New York Times v. Sullivan and its progeny." Id. at 1088. Summary judgment for the defendants was warranted by applying the tests we have established in Carson and Grzelak, supra.

We note finally that although the plaintiff attempts to surmount the obstacles imposed by New York Times, his major thrust continually goes to the truth or falsity of the published statements rather than to the basic problem of whether they were published with actual malice. Factual error is inevitable in free debate and must be countenanced in order to give freedom of expression "breathing space." New York Times Co. v. Sullivan, 376 U.S. 254, 271-272 (1964). A rule limiting constitutional protection to only true statements would lead to self-censorship because

difficulty in proving truth would cause those voicing criticism to "steer far wider of the unlawful zone." Id. at 279.

As Chief Judge Kaufman recently said in Edwards v. National Audubon Society, Inc., ...F.2d..., (Nos. 77-1026/7, 2d Cir., decided May 25, 1977), "the interest of a public figure in the purity of his reputation cannot be allowed to obstruct that vital pulse of ideas and intelligence on which an informed and self-governing people depend."

JUDGMENT AFFIRMED.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 16, 1977. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

I

Whether the Appellate Court applied the correct standard of review, i.e., that the plaintiff must prove actual malice at the summary judgment stage of litigation, in determining whether the District Court erred in granting summary judgment to the author-publisher defendants.

II

Whether proof by affidavits to show that numerous defamatory statements which appeared in the article in question and which were attributed to various sources were never made by those sources or were distorted and misstated by the author is sufficient to show publication with "actual malice" for purposes of summary judgment.

III

Whether defamatory misstatements of a defendant-author's own notes as well as factually unsupported defamatory conclusions drawn by the author but published as "facts" by him are sufficient to show "actual malice" for purposes of summary judgment.

IV

Whether a publisher of highly defamatory material which clearly makes substantial danger to the reputation of the public official apparent has a duty to investigate the sources and accuracy of information where the material being published is not "hot news".

V

Whether a publisher of highly defamatory material who has been put on notice that an

article is false and defamatory prior to repeated publication of the article may rely solely on the author's representations of accuracy without conducting an independent investigation.

VI

Whether a positive showing that an author published as "fact" numerous false statements, misstated or twisted statements of others, and reached defamatory conclusions from innocuous information is sufficient to demonstrate "actual malice" for purposes of summary judgment.

VII

Whether an author who goes beyond the disinterested reporting of news and launches a personal attack against a public official may claim immunity underthis Court's decision in New York Times v. Sullivan.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

The libel action which forms the basis of this appeal was brought by Thomas R. Fadell for alleged false and defamatory statements made about him in the November, 1972 issue of Harper's Magazine in an article entitled "A Tax Assessor Has Many Friends." By its own characterization, as stated in the article's sub-title, it purported to be "The Story of Tom Fadell, his rise to power in Gary, Indiana, and why he will probably stay there." Numerous issues of the Harper's Magazine which contained the article carried a bright red tag on the cover which announced "Crooked Taxes in Gary, Indiana."

On Saturday, October 14, 1972, Fadell received an advance galley proof of the Harper's article from an anonymous source. (Fadell Dep. pp 247-49). He had received no correspondence from Harper's up to this time, and this was the first time he had seen any of the charges made against him in that publication. On Monday, by letter dated October 16, 1972, Fadell notified Harper's that the galley proof he received was false, defamatory, and libelous. Upon receipt of this letter. Harper's did nothing to stop the circulation of the article. (Barnard Dep. pp. 217-219). On October 27, 1972, Fadell sent a Notice of Libelous Publication to

Harper's wherein he set out twenty-four (24) libelous points and explained briefly how they were false and inaccurate. (Amended Complaint, Exh. No. 5 attached thereto and made a part thereof). Harper's again did nothing to stop the circulation and publication of the article, or the re-orders of it.

Thomas Fadell filed this libel action in the United States District Court for the Northern District of Indiana on December 13, 1972 and by leave of that Court, filed an amended complaint on October 11, 1974.

Parties

The petitioner, Thomas R. Fadell, is and was during all times relevant hereto, the duly elected Assessor of Calumet Township, Lake County, Indiana. He had been elected to that position in 1958, and re-elected in 1962, 1966, 1970 and 1974. A practicing attorney, Fadell received his law degree from Tulane University School of Law, and while at Tulane, was elected student president, was a member of the Law Review, and received scholastic recognition through initiation in the Order of Coif, a national honorary legal society. Having served this country as a Lieutenant in the United States Marine Corps, Fadell returned to Gary, Indiana, to pursue the practice of law.

Fadell maintains an active legal practice today, as he has done since 1954. He is married and the father of four daughters.

Defendants Below

Named as defendants in this libel action are the article's author, George Crile; Minneapolis Star and Tribune Company, Inc., a corporation incorporated under the laws of the State of Minnesota having as its principle place of business the State of New York, and having as a division, Harper's Magazine Company; John Cowles, Jr., the President and Chairman of the Board of the Minneapolis Star and Tribune Company, Inc ; Russell Barnard, the Publisher of Harper's Magazine; Robert Shnayerson, the Editor-in-Chief of Harper's Magazine; and Anne Crile, the wife of author George Crile.

The author of the article which forms the basis of this libel action, George Crile, was twenty-six years old at the time of publication. (Ridder Dep. p. 7). He had first begun working for the Gary Post-Tribune newspaper in March of 1970. (Crile Dep. p. 52). He was employed there in 1970 and most of 1971. Late in 1971, Walter Ridder, the Post-Tribune's publisher, transferred Crile to the Ridder Newspaper's Washington Bureau. (Ridder Dep. p. 7, 53). Onereason for that transfer was because the editors at the Post-Tribune disliked and resented Crile. (Ridder Dep. p. 52-53). In January of 1972, Ridder fired Crile. (Crile Dep. p. 81). Soon thereafter, Crile began working with Nelson Aldrich, associate editor of Harper's Magazine, on the article complained of herein. (Aldrich Dep. p. 17-19).

Prior to his employment at the Gary Post-Tribune newspaper, Crile attended Trinity College where he received his bachelor of arts degree. (Crile Dep. p. 11-12). He then jointed the Marine Corps in a reserve program to study the Russian language at the Defense Language Institute in Monterey, California. (Crile Dep. p. 39). Crile stated upon deposition that while in California, he saw a psychiatrist one time. (Crile Dep p. 1192). However, his wife stated she believed he saw a psychiatrist for a period of three to four months. (Anne Crile Dep. p. 7). Since the publication of the Harper's article, Crile has sought psychiatric treatment on thirty to forty occasions. (Crile Dep. p 1190). He has refused to explain the nature of his psychiatric problem. (Crile Dep. p. 1190). Crile also admitted to the use of marijuana, after having been ordered by the federal district court to answer questions relating to his drug use, but refused to comment on his use of other controlled substances, specifically LSD, heroin, etc. (Crile Dep. p. 1210, 1217).

Summary Judgment

The respondents, as defendants below, filed three motions for summary judgment; one for the author George Crile, one for his wife, Anne Crile, and one for the remaining defendants (collectively referred to hereafter as Harper's). In support of their motions,

the respondents submitted seven volumes of exhibits consisting primarily of photographic copies of George Crile's note pad, secondary sources such as newspaper articles, etc , concerning Gary, Indiana, and rap sheets purportedly given to the author by a Mr. Oral Cole who had gathered this information for a purpose other than the Harper's article. (the IRS documents). No affidavits by any of respondent's alleged sources were submitted by respondents to show that Crile had actually talked to those sources or, if he did talk with them, to show that he accurately reported what they had told him. Respondents directed their memorandum to twenty-four passages in the article which petitioner complained of in his Notice of Libelous publication. Respondents did not, however, discuss all the allegedly libelous passages raised by petitioner in his complaint as amended.

The petitioner, Thomas Fadell, as appellant below, filed his combined Motion and Memorandum (consisting of 232 pages) in Opposition to Summary Judgment, and accompanied with it three volumes of exhibits and affidavits to show that the respondents published false and defamatory statements with "actual malice". (Fadell S.J. Memo. Vol. I-III). Of those exhibits, approximately fifty are affidavits from various persons respondents contend were Crile's sources of information or were involved in the acts which Crile wrote about in the Harper's article. (Fadell S.J. Exh. Vol. I-III). In his memorandum, petitioner

cited twenty-two specific false and defamatory statements which either directly or indirectly referred to him and caused injury to his reputation. Those points are set out below:

1. Continued circulation of Harper's after having received notice that the publication was false and libelous.

2. Tag - "Crooked Taxes in Gary, Indiana".

3. "Harper's Releases" - relating to two pre-publication releases written by Harper's defendants and which stated defamatory falsehoods that were not even stated in the Harper's article.

4. "Run off the Road" -referring to innuendo in the article that petitioner was somehow involved in an alleged attempt to have George Crile rune off the expressway.

5. "Mafia" - referring to statements in the article which suggested that petitioner had ties to organized crime.

6. "Post-Tribune Real Estate Assessment" - relating to Crile's statements in the article saying the Post-Tribune newspaper was grossly underassessed, that

petitioner was responsible, and that a "business deal" had been worked out with petitioner.

7. "Thrown out of Post-Tribune" - referring to a statement in the article which said petitioner got into an argument at the Post-Tribune newspaper, was thrown out and then arbitrarily raised its assessment because of the argument.

8. "Gary-Hobart Water" - referring to statements in the article which relate how petitioner improperly assessed the water utility company.

9. "U.S. Steel Tax Break" - referring to Crile's charge in the article that petitioner had improperly and intentionally underassessed the steel mill.

10. "Unexplained Drop- Business Arrangement and Mysterious Reductions" - referring to a passage in the article which stated that petitioner improperly lowered assessments in exchange for some "business arrangement" for his personal benefit.

11. "School and City Crises" - referring to passages in the article which state that petitioner submitted phony assessment figures in order to destroy the Gary City budget and bring about a financial crises.

12. "Destruction of Records"- referring to Crile's statement that petitioner illegally destroyed all assessment records by having them buried in the Gary City Dump.

13. "2% Fund and Kickbacks from Employees" -feferring to statements in the article which charged petitioner with using public monies for his personal use and with forcing employees of the assessor's office to illegally kickback money to him.

14. "Part-Time Workers Paid to Campaign" - relating to Crile's statement that petitioner paid monies from public funds in order to have people campaign for him.

15. "Screw and Bolt - Soliciting Bribes" - referring to passages in the article where respondents state that petitioner shook down taxpayers for lower assessments.

16. "I'm the Law" - referring to a statement in the article which depicted petitioner as usurping the law in Lake County, Indiana.

17. "Inference - Small Business Empire Gained by Illegal Means" Referring to passages in the article suggestive of petitioner improperly becoming prosperous through misuse of his public office.

18. "Conduits to Channel Money" - referring to statements in the article which infer petitioner set up dummy corporations in order to divert public funds to his own use.

19. " Inference that Grand Jury should have Indicted Fadell" - referring to numerous passages which, in their totality, suggest petitioner brought pressure upon grand jury in order to prevent it from indicting him.

20. "Threats to IRS Agents" - referring to statements in the article which assert that petitioner improperly raised assessments of IRS agents.

21. "Fadell's Interference with Electoral Process" - referring to numerous passages which depict petitioner as improperly interferring with the Gary City Primary elections in 1971.

22. "Oral Cole's Personal Disaster" - referring to the inferences in the article that petitioner directly caused the personal destruction of the life of an IRS agent.

Both petitioner and respondents submitted proposed findings of fact and conclusion of law to the District Court below. On December 1, 1976, the District Court judge granted summary judgment in favor of all the defendants and adopted respondent's findings of facts and conclusions of law. Additionally, the Court below entered a Memorandum Opinion wherein it stated its reasons for so ruling.

Petitioner, as appellant below, appealed from that decision to the United States Court of Appeals, Seventh Circuit. After having heard oral argument, the Appellate Court affirmed the decision of the District Court by order dated June 16, 1977. It is from that decision that appellant below, as petitioner, applies to this Court for review.

REASONS FOR GRANTING WRIT

Conflicts Between the Circuits, The Circuits and Supreme Court, and Failure to Follow Precedent

Since the decision of this Court in the landmark case of New York Times v Sullivan, 376 U.S 254 (1964), no definitive statement

has ever been promulgated which states the correct standard of proof which a public official plaintiff must meet in order to survive summary judgment. From that decision, it is clear that in order for the public official plaintiff to ultimately prevail in a defamation case he must show that " the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. 376 U.S. at 279-80.

After the Times decision, this Court has defined, clarified, and exemplified what it meant by "actual malice." For example, in Garrison v. Louisiana, 379 U.S. 64 (1964), this Court explained that "only those false statements made with the high degree of awareness of their probably falsity demanded by New York Times may be the subject of either civil or criminal sanctions." Id. at 74. In Curtis Publishing Co. v. Butts, 338 U.S. 130 (1967) this Court further stated that:

> "...evidence of either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity' was essential to recovery by public officials in defamation actions."

St. Amant v Thompson, 390 U.S. 727, 731 (1968) (emphasis added). This Court even went so far as to adopt some examples of "reckless disregard" previously cited by Mr. Chief Justice Warren in his concurring opin-

ion in Curtis Publishing Co. v. Butts, 388 U. S. 130 (1967), wherein he stated that recklessness can be found where a story is fabricated by the defendant; is the product of the defendant's imagination; is based wholly on an unverified anonymous telephone call; is so inherently improbable that only a reckless man would have put it in circulation; or where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. St. Amant, supra, 390 U.S. at 732.

However, even though these holdings helped establish guidelines as to what ultimately constitutes "actual malice,", there still has been no definitive statement by this Court directed to the question of the public official plaintiff's burden and the extent of proof he must offer to defeat a defendant's motion for summary judgment. To date, this Court's only guideline as to that question has been that there is no simple method to determine whether "actual malice" exists, and that each case must be scrutinized on an individual basis. Time, Inc. v. Hill, 385 U.S. 374, 390-91 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130, 148 (1967). As a result of this vagueness, the lower courts have begun to fashion and adopt their own standards for determining the respective parties' burdens at the summary judgment stage in litigation. In Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970), the Appellate Court there announced the following standard of review:

We thus proceed to an examination of the record, viewing it and the inferences which might be drawn therefrom in the light most favorable to Bon Air* (the party opposing summary judgment), to ascertain whether "the record established by (Bon Air) demonstrate(s) that there is no issue of fact from which a jury could find 'actual malice'." Time, Inc. v. McLaney, supra, 406 F.2d at 567; see Rule 56(c), Fed. R. Civ. P. (parenthetical added).

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* Citing as authority United States v. Diebold, Inc. 369 U S. 654, 655 (1962); Goldwater v. Ginzburg, 414 F.2d at 337; Time, Inc. v. McLaney, 406 F.2d at 571-72.

The federal trial court for the Northern District of Illinois appears to have adopted this standard by holding:

> To survive summary judgment proceedings it is necessary that he (plaintiff) offer some evidence upon which a jury could find convincing clarity* of actual malice or reckless disregard. The decisions require that he come forward with evidence of the defendants' state of mind; in effect, he must prove a negative. There must be "sufficient evidence to permit the conclusion that

> the defendant in fact entertained serious doubts.**
>
> * * *
>
> The plaintiff must bear the burden of coming forth with affirmative evidence of facts indicating the defendants' probable knowledge of the falsity.

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* Citing New York Times v. Sullivan, 376 U.S 254, 286 (1964).

** Citing St. Amant v. Thompson, footnote 12 supra.

Novel v. Garrison, 338 F. Supp. 977, 980 (N.D. Ill 1971). (Emphasis added.) Additionally, it should be noted that these holdings were based on Supreme Court decisions stating that the public official plaintiff's burden on summary judgment is to bring forth some evidence, or sufficient evidence, or affirmative evidence of facts indicating the defendants' probable knowledge of falsity. A California district court stated this standard in the following language:

> "...that it (the plaintiff) had sufficient probative substance to be able litigably to give rise to an issue of fact on whether such malice actually existed or not..."

Hensley v. Life Magazine, Inc., 336 F. Supp. 50 (M.D.C.I. 1971), citing United Medical Lab, Inc. v Columbia Broadcasting System, 404 F.2d at 712 (1968) (emphasis added).

These pronouncements would seem to indicate that at the summary judgment stage, the function of the court is to review the evidence to see if some portion of it is of such a nature that a jury (or the finder of fact) could determine that the publication was made with "actual malice." If any such evidence is submitted, then the courts function is to allow the jury, after a trial on the merits of the case, to determinewhether 'actual malice" existed. See, e.g., Speake v. Tofte, 327 F. Supp. 200 (D.D.C. 1971); Arizona Biochemical Co. v. Hearst Corp, 302 F. Supp. 412 (S.D.N.Y. 1969), citing St. Amant v. Thompson, supra, and Pope v. Time, Inc., 354 F 2d 558 (7th Cir. 1965) cert. denied 384 U S. 909 (1966); Goldwater v. Ginzburg, 261 F. Supp. 784 (S.D.N.Y. 1966) aff'd 414 F.2d 324 (2d Cir. 1969); and Dodd v. Pearson, 277 F. Supp. 469 (D.D.C. 1967).

However, in the present case, both the Federal District Court and the Appellate Court imposed a much stricter burden of proof on the plaintiff, petitioner herein. The District Court held that for purposes of summary judgment, the plaintiff must prove "actual malice" with 'convincing clarity:"

> "Thus, in order to prevail in this case, the plaintiff must establish that Harper's either knew that allegedly defamatory statements in the article were false, had a high degree of awareness of their probable falsity, or entertained serious doubts as to the truth of the statements."

(Memorandum Opinion, Appendix p. C-22). The District Court reached this conclusion by applying the ultimate test set forth by this Court in Gertz v. Robert Welch, Inc., supra, which alluded to:

> "... clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth."

Gertz v. Robert Welch Inc., 418 U.S. 323, 342 (1974). The Court of Appeals also applied this standard of proof against the petitioner, holding that:

> "Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary, that the plaintiff can prove actual malice in the Times sense, it should grant summary judgment for the defendant, " citing Wasserman v. Time, Inc., 424 F. 2d 920 922-23, (D.C. Cir. 1970) (concurring opinion).

(Opinion, Court of Appeals; Appendix p. A-4).

It is readily apparent that two distinct burdens of proof are being imposed by the various courts at the summary judgment level. The first burden of proof, and that which petitioner submits is the correct standard, is that the District Court must review the summary judgment materials to see whether some evidence has been offered from which a jury could find "actual malice." This is a less stringent burden than that ultimately imposed on the public official plaintiff at the trial of the case and it is this burden that the courts cited above have advanced. The second burden of proof, as imposed by the district and appellate courts in this case equates to a full blown trial on the merits through affidavits, depositions, and the like whereby the plaintiff must actually prove the existence of actual malice in order to proceed to trial, rather than submit some proof from which the jury could find it.

Due to the fact that the function of the Court reviewing the evidence at this crucial stage of public official defamation litigation is unclear; the fact that the various Circuit Courts are applying different standards of review; and the fact that the district and appellate courts in this case have applied a standard of review which appears to be contrary to that standard implied by this Court in New York Times v. Sullivan and St. Amant v. Thompson, petitioner respectfully prays that this Court review the decision herein and grant this Petition for Writ of Certiorari.

II

THE COURTS BELOW ERRONEOUSLY DISREGARDED PETITIONER'S PROOF FROM WHICH A JURY COULD FIND ACTUAL MALICE WITH CONVINCING CLARITY

Admittedly, a public official plaintiff's burden of proof in a defamation action is indeed difficult regardless of the standard of proof required of him by the court. No author-defendant will admit on deposition that he published false facts knowingly. Nor will such a litigant admit that he acted in reckless disregard of whether his publication was true or not. Conversely, and for much the same reasons, the courts have consistently rejected such defendants protestations of "good faith" publishing or publication without malice. See; e.g., Curtis Publishing Co. v. Butts, 338 N.S. 130 (1967); Carson v. Allied News Co., 529 F. 2d 206, 213 (7th Cir. 1976). Instead, the courts have looked to the particular facts brought forward by the public official plaintiff to determine whether a jury could find "actual malice" in the Time's sense from these facts. Exactly what type of evidence is demonstrative of actual malice is, as has been said previously, a matter of interpretation based upon each individual case. However, at this point in the development of public official defamation law, numerous cases have evolved which are illustrative of proof sufficient to permit the defamed plaintiff to proceed to trial. Those cases, as well as the basis upon which these courts found that the plaintiff had met his burden of proof for purposes of summary judgment, are set out below in capsulized form:

Capsulization of Indicia
Showing "Actual Malice"

St. Amant v. Thompson, 390 U.S. 727 (1968), citing with approval Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (Warren, C. J., concurring opinion).

1. Story is fabricated by writer.

2. Story is product of writer's imagination.

3. Story based wholly on unverified anonymous telephone call.

4. Story is so inherently improbable that only a reckless man would put it into circulation.

5. Obvious reasons to doubt veracity of informant or accuracy of his reports.

Time, Inc. v. McLaney, 406 F.2d 565 (2d Cir. 1969).

6. Actual knowledge or suspicion as to falsity of statements.

7. Evidence that writer had before him contra-indications as to correctness of his conclusions.

Ragano v. Time, Inc., 302 F. Supp. 1005 (M.D. Fla. 1969).

8. Evidence of deletions of known facts and substitution of opinion while representing those statements as facts.

9. Evidence of writer's state of mind as to subject of article.

10. Author's conclusion of guilt by association stated as fact without providing reader with underlying facts upon which author reached his conclusion.

Goldwater v. Ginzburg, 414 F.2d 324 (5th Cir. 1969).

11. Use of preliminary drafts (galley proofs) to show malice, i.e., what was published as opposed to what was omitted.

12. Preconceived ideas of author about the subject matter of article and reckless treatment of facts to substantiate those preconceived ideas.

Goldwater v. Ginzburg, con't.

13. Drawing conclusions without aid of expert in area that only expert could accurately make such conclusion, and stating such conclusions to be proven facts.

14. Writer attributes statements to persons, but unable to remember person or otherwise substantiate statements upon deposition.

Carson v. Allied News Comp., 529 F.2d 206 (7th Cir. 1976).

15. Whether or not substance of article was "hot news."

16. Obviously, defamatory "fact" published without verification or substantiation.

With these guidelines as precedent, Petitioner presented the same type of proof in the present case in order to offer "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts" and some evidence upon which a jury could find actual malice or reckless disregard. New York Times v. Sullivan, Supra.

Numerous examples of such proof could be placed before this court based upon the nearly fifty (50) affidavits submitted by the defendant - authors alleged sources who deny ever having made statements to the author from which he could have reached the defamatory conclusions he published in the Harper's article as fact; who state that the defendant - author misstated valuable information which they gave him and twisted other innocuous information into defamations; and who state that the defendant - author attempted to "put words in their mouth" and get them to say something bad about the Petitioner - plaintiff. However, for purposes of this Petition, a few such examples will suffice to demonstrate that Petitioner had met his burden of proof at the summary judgment level.

Respondent - Crile, the author of the publication at issue, wrote the following of Petitioner - Fadell:

> There are two kinds assessments for corporations: real estate, which includes valuations for buildings and land, and business personal property, which includes the value of machinery and inventories. The paper's real estate assessment was $42,000 for the land. The value placed by the assessor on the building - a several million-dollar-ten-year-old structure with more than seven miles of pipes and 770 tons of steel sections covering 103,870 square feet-was $3,700. Even the far smaller and obsolete Hammond Times building in the neighboring township had a $150,000 real estate assessment. With a little digging I found that the history of my paper's assessment presented a disturbing implication.
>
> Under the previous owners and into the first years of the Ridders' ownership, the building's assessment was set at $500 and land's at $3,000. This was from 1962 to 1969.

Crile used this example to show the gross impropriety of Petitioner's assessment practices, and also to support his factual assertion that in order to get such a low assessment, the Post - Tribune newspaper and Petitioner had reached improper "business agreement." In their memorandum in support of motion for summary judgment, Respondents admit that this passage from the article was false. Indeed, that statement of purported fact was entirely false. Crile, the investigative reporter, was using assessment figures for a parking - lot shed on an almost totally unimproved and undeveloped piece of property--he had the wrong building, the wrong piece of land, and the wrong owner of the property. To show that this defamatory statement was not only false but was also published with "actual malice," Petitioner submitted the following proof:

(a) The deposition testimony of Walter McCarthy, who was then comptroller of the Post Tribune, and who testified that when Crile told him of the low assessment figures he had found for the Post-Tribune building, he informed Crile that he had the wrong property. (McCarthy dep. p. 6);

(b) McCarthy also testified that he warned Crile that tax assessments of the Post-Tribune were "too complex and could not be properly explained to the reading public." This was admitted by Crile. (Crile Answ. to Interrog. No. 166).

(c) The deposition testimony of James Rasmussen, who was then the Editor of the Post Tribune and who was working closely with Crile, who stated under oath that he felt Crile knew prior to publication that his assessment figures of the Post Tribune were wrong. (Rasmussen dep. p. 38).

(d) The deposition testimony of Walter Ridder, owner of the Post Tribune, who testified that he had told Crile that the Post Tribune building was only leased and not owned by Ridder Publications. (Ridder dep. p. 23, 25). Yet Crile used assessment records based upon ownership of the property.

In light of such evidence by identified, responsible persons who testified that author - Crile knew that his "facts" were false, yet published them anyway, it is difficult to find more conclusive proof of publication with actual malice, i.e., with knowledge of falsity or with reckless disregard for whether the statements are true or not. Moreover, such conduct is also indicative of actual malice based on Goldwater v. Ginzburg, supra, 414 F.2d at 331-32, which held actual malice exists where "the conclusions in the published article were never evaluated by any expert in the field....." This proof was disregarded by the lower courts.

At page 106 of the Harper's article, Crile wrote the following defamatory statements to again show purposeful and improper assessment practices on the part of the Petitioner:

> "For example, valuations of seven properties of the privately owned water company in Gary were reduced from $257,765 to $37,690 in one year. This meant a reduction of about $31,000 in the company's annual tax bill. Over a ten-year period this would amount to more than a $300,000 tax reduction."

To offer some proof of actual malice, Petitioner submitted the following to the courts below:

> (a) The affidavit of Leo Louis, President of utility company referred to in the passage, who stated under oath that "the records of Gary-Hobart Water Corp. do not reflect a reduction from $257,765 to $37,690 in the assessed valuation of any seven of its properties (or any of its properties) in Gary, Indiana, in any year." (Plaintiff summary judgment exh. No. 24).

> (b) The assessment figures found in the Lake County Autitors office for the years referred to in the above passage which showed an actual increase in assessments. (Plaintiff summary judgment exh. no. 120).

> (c) The applicable Indiana Statutes (Burns Ann. Stat. 364-1802 et.seq.) showing that the State Tax Board is responsible for assessing the distributable property of a public utility in Indiana and certifying that final assessment to the county auditor. This shows also that Petitioner could not have even done the act of which he was accused by Crile.

Respondent - Crile, in answer to this proof, stated that he may have been ignorant of the "special system" used to assess utilities in Indiana. He also states that he relied on some general comments made by a Mr. Joseph Geeslen, a past chairman of the State Board of Tax Commissioners, who stated that while he occupied that position, "he had learned of situations where utilities had to have their assessments substantially increased by the State Tax Board." (Defendants summary judgment memo, p. 49). Based upon Crile's ignorance of assessing utilities and an innocuous statement by Mr. Geeslen, then, Crile recklessly published this defamatory statement about Petition and represented it to be "fact" to the reading public. From such proof a jury could certainly have found "actual malice." Additionally, the twisting of innocuous information (Goldwater v. Ginzburg, supra; Carson v. Allied News Co., supra) and again, the failure to get expert opinion in an area of reporting which demanded it (Goldwater v. Ginzburg, supra; Curtis Publishing Co. v. Butts, supra) are both indicative of actual malice. At the very least, Petitioner has presented numerous examples of erroneous facts and gross misstatements published by Respondents Crile and Harpers. This, too, is some evidence from which a jury could find "actual malice;"

> As already stated, supra, Times does not hold that evidence of negligence is inadmissable; it only holds that evidence which merely establishes negligence in failing to discover misstatements, without more, is constitutionally insufficient to support the finding of recklessness required to establish actual malice from proof of less than prudent conduct. Recklessness is, after all, only negligence raised to a higher power. To hold otherwise would require that plaintiff prove the ultimate fact of recklessness without being able to adduce proof of the underlying facts from which a jury could infer recklessness. It would limit successful suits to those cases in which there is direct proof by a party's admission of the ultimate fact,

certainly a situation not intended by the Supreme Court. See St. Amant v. Thompson, supra, 390 U.S. at 732-733, 88 S. Ct. 1323.

Goldwater v. Ginzburg, 414 F.2d 324, 343 (1969).

(3)

Crile wrote, on page 109 of the Harpers article, the following defamatory statement:

> .....my investigation (of U.S. Steel) posed two challenges: to find out by just how much the plant was underassessed and to establish conclusively who was responsible for the tax break."

Later in the article, Crile concluded that it was Petitioner who had been improperly assessing U. S. Steel and who was intentionally giving it tax breaks. To offer proof of "actual malice," Petitioner submitted the following to the courts below:

(a) The affidavit of William Shery, whom Crile represented to be one of his sources of information and who was then the neighboring Portage Township Assessor, wherein Mr. Shery states that he did not say a number of the things which Crile attributed to him; did not say Petitioner had the duty or ability to raise the assessment of U. S. Steel in Gary, Indiana; and did not draw an analogy between what he had done in another township and what Petitioner should or should not do in Calumet Township.

Moreover, Mr. Shery also stated under oath in his affidavit the following:

> "It is my judgment that Crile tried to put words into my mouth during the interview, and tried very hard to get me to say something adverse about Tom Fadell, the Calumet Township Assessor. (Plaintiffs summary judgment exh. 27).

(b) Respondent - Crile's own tape-recorded interview with John Pers, the North Township Assessor, which established that Crile knew the local assessors were not responsible for assessing the steel mills because the State Board of Tax Commissioners had taken over that responsibility. In fact, that tape recording conclusively shows Crile's knowledge of the falsehood he was publishing:

Crile: Well, I don't want to be repetitious or anything, but I think what you're saying is that a local assessor in this particular juncture in the last two or three years has not had responsibility for assessing the---if you were to look at it in fact---for assessing the steel mills.

Pers: They had responsibility for initiating assessment, but they were superceded by the State, who wanted to assume the authority throughout the whole state of making personal property assessments.

Crile: You mean, no personal property assessments?

Pers: Well, hell, your paper wrote this up many times.

Crile: Well, --

Pers: Don't you read your paper?

(Plaintiffs summary judgment p. 112-13).

(c) The affidavit of Gunner Fog, then superintendent of Union Carbides Gary Plant and another purported source of Criles, who stated that he never made the statements attributed to him by Crile and represented in the Harper's article as quotations from him.

(d) The text of the statement Petitioner made before Senator Muskie's subcommittee hearings on assessments, which shows first, that contrary to what Crile wrote in his article when he said that the subcommittee had not, in fact, met yet, the subcommittee had met nearly four (4) months prior to publication. Second, it showed that Crile was aware of the fact that local assessors, such as Petitioner, have no part in the assessment of U. S. Steel or other mills in Indiana; the State Tax Board makes in independent assessment. Crile admits to being present at these subcommittee hearings.

(e) The text of a newspaper article written by Leigh Plummer in August, 1966, which Crile stated to the courts below that he relied on to reach his conclusions that Petitioner was responsible for improperly giving tax breaks to U. S. Steel, but, which, in fact, placed the blame, if any was to be placed at all, on the State Tax Board and the Governor of Indiana (Plaintiff summary judgment exh. No. 25).

By offering proof that author Crile disregarded known facts about the assessment of steel mills; knew the final assessment had been made by the State Tax Board for the past ten years; knew that his own source, Leigh Plummer, put the blame squarely on the State Tax Board and the Governor; knew that Petitioner had stated these facts to the Muskie subcommittee hearing; and knew that Petitioner had actually helped increase taxes of the mills by millions of dollars, Petitioner met his burden of proof at the summary stage of this litigation and was entitled to allow the jury to consider whether Crile's publication of alleged "facts" contrary to this knowledge was done knowing his article to be false or in reckless disregard to whether it was false or not. Again, however, the lower courts disregarded this proof.

Numerous other glaring examples of publication with actual malice were raised to the courts below along with proof to show Crile's recklessness and/or knowledge of falsity. For example, Crile wrote on page 103 of the Harper's article that Petitioner had destroyed all the township's tax assessment records in 1967 by burying them in the Gary City dump. Of course, such a factual assertion was false, even ludicrous. But the question for purposes of this case was whether the publication of such a "fact" was reckless disregard for the truth? Crile never went to the dump to verify this statement, nor did he or any one else check the Assessor's records to learn that all personal property returns (assessment records) were still on file and personally signed by each individual taxpayer. This defamatory "fact" could easily have been checked, but Crile chose not to do so. Now, however, he seeks first amendment protection from liability claiming he had the right to rely on hearsay told to him by others, and the right to print that as fact. Petitioner submits that this is not the law, as shown by this court's holding in Curtis Publishing Co. v. Butts, supra;

> "The evidence showed that the Butts story was in no sense 'hot news' and the editors of the magazine recognized the need for a thorough investigation of the serious charges. Elementary precautions were, nevertheless ignored. The Saturday Evening Post knew that Burnett had been placed on probation in connection with bad check charges, but proceeded to publish the story on the basis of his affidavit without substantial independent support. Burnett's notes were not even viewed by any of the magazine's personnel prior to publication. John Carmichael who was supposed to have been with Burnett when the phone call was overheard was not interviewed. No attempt was made to screen the films of the game to see if Burnett's information was accurate, and no attempt was made to find out whether Alabama had adjusted its plans after the alleged divulgence of information.

> "The Post writer assigned to the story was not a football expert and no attempt was made to check the story with someone knowledgeable in the sport. At trial such experts indicated that the information in the Burnett notes was either such that it would be evident to any opposing coach from game films regularly exchanged or valueless. Those assisting the Post writer in his investigation were already deeply involved in another libel action, based on a different article, brought against Curtis Publishing Co. by the Alabama coach and unlikely to be the source of a complete and objective investigation.

Butts, supra, 388 U.S. at 157-58.

It should be noted, too, that when author - Crile wrote this same story in his series for the Post Tribune Newspaper (a series never published because the attorneys for the Post Tribune determined it was unsubstantiated), the attorneys reviewing this charge of public records being destroyed wrote in the margin "Tapes (of Crile's sources) do not support the article after careful analysis." (Plaintiff summary judgment exh. No. 114).

Petitioner also submitted some proof of author - Crile's state of mind toward the subject of his defamatory article. For example, a letter from Walter Ridder to Crile while he was employed by the Post Tribune chastized Crile for having the general reputation of "being out to get Fadell," the Petitioner. (Plaintiff summary judgment exh. No. 18). In one tape recorded conversation between Crile and Phillip McFarren, a member of U. S. Steel's tax division, Mr. McFarren had explained to Crile that Petitioner was not responsible for any alleged shortage in school revenue and that the total valuation certified for the City of Gary budget was done by the Lake County Auditor, and not Petitioner as assessor. (Plaintiff summary judgment exh. No. 47). However, the tape recording then shows Crile asking McFarren; "What conceivably could his role be if one were to think the worst?" (Plaintiff summary judgment exh. No. 144).

The hypothetical answer given in response to this question, i.e., that a phony assessment figure could be passed on to the County Auditor by the Assessor, was the basis for the defamations published by Crile as fact in the Harper's article. (Plaintiff summary judgment exh. No. 39). Additionally, Crile himself even characterized his work as "digging up some dirt on Fadell." This was Crile's own words as written in an earlier version of the Harper's article, but changed by Harper's editors to "investigate" Fadell. Despite the change of wording, this still is proof showing that Respondent - Crile went beyond mere neutral reporting of stories coming to his attention. Instead, he purposefully launched a personal attack on a public official, and is deserving of no constitutional protection:

> ".....(A) publisher who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on the privilege of neutral reportage. In such instances he assumes responsibility for the underlying accusations. See Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U. S. 1049, 90 S. Ct. 701, 24 L. Ed. 2d 695 (1970).

Edwards v. National Audubon Society, Inc.; 556 F.2d 113 (2d Cir. 1977). The above cited holding is particularly applicable in the present case where author - Crile used secondary sources, hearsay, undocumented reports, and similar sources to support his article, yet nowhere stated in the Harper's article that what he was writing was his opinion or the opinions of others based on such secondary sources. Instead, he depicted the entire article as based on documented "facts" personally known to him to be true and substantiated. Such conduct, unquestionably constitutes "actual malice."

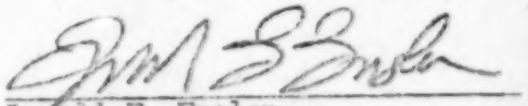
CONCLUSION

This Court's justified demand for brevity and conciseness in Petitions such as this makes it impossible to go through each offer of proof made by Petitioner below in order to bring forth some evidence upon which a jury could find "actual malice." Petitioner spent approximately two hundred and thirty (230) pages and three volumes of exhibits developing and offering this proof to the district court below. The same quantity and quality of proof was presented as to each of the twenty-two (22) specific libelous points to which Petitioner addressed himself as has been exemplified above. Yet despite such a showing, the courts below disregarded this proof or accepted instead the Respondent's protestations of "good faith reporting" and belief in the truth of what he was publishing. The haunting question left for Petitioner and this court to answer in light of the lower court's decisions is whether a cause of action even exists at all anymore for a public official who has been defamed by an author - publisher, or have decisions such as the ones here at issue so emasculated this court's initial holding in New York Times v. Sullivan that it is no longer possible for a public official to ever prevail in a defamation action?

Petitioner respectfully prays that this Court will answer this question, as well as the questions raised in this Petition and in the Issues Presented for Review, by issuing a Writ of Certiorari to the Seventh Circuit Court of Appeals herein. These questions are issues much too important to allow the circuit courts to proceed in this area of constitutional law without guidance and a definitive statement from the Supreme Court. This Court recently held in Time, Inc. v. Firestone, ____ U.S. ____, 96 S Ct. 958, ___ L. Ed. 2d ____ (1976), that the Court's expansion of the original decision in New York Times v. Sullivan has gone too far. Just as

this was true of public figure defamation actions, a review of this case will disclose that the restrictive doctrine of Time's has also been expanded too far in a public official defamation case. Petitioner prays that this Court will permit such a review.

Respectfully submitted,



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